

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
WESTERN WASHINGTON REGION  
STATE OF WASHINGTON

WHIDBEY ENVIRONMENTAL ACTION  
NETWORK (WEAN),

Petitioner,

v.

ISLAND COUNTY,

Respondent.

Case No. 14-2-0009

**ORDER DENYING MOTION FOR  
RECONSIDERATION AND  
RECONFIRMING FINDING OF  
COMPLIANCE**

This matter came before the Board on WEAN's Motion for Reconsideration<sup>1</sup> of the Board's Order Finding Compliance and Closing Case (Order Finding Compliance).<sup>2</sup> Island County (County) responded on April 26, 2017.<sup>3</sup> By order dated May 1, 2017, WEAN's Motion for Reconsideration was granted based solely on the Board's determination that it had erred in disallowing consideration of transcripts of four Island County Planning Commission and Board of County Commissioner meetings.<sup>4</sup> The Board deferred addressing the substantive portions of WEAN's Motion for Reconsideration pending receipt and review of the transcripts. Pursuant to the Board's order, WEAN submitted the transcripts for the Board's consideration as Exhibits 449, 450, 451, and 452.<sup>5</sup> The County subsequently filed corrected transcripts.<sup>6</sup>

<sup>1</sup> Filed April 18, 2017.

<sup>2</sup> Issued April 10, 2017.

<sup>3</sup> Island County's Answer in Opposition to Petitioner's Motion for Reconsideration.

<sup>4</sup> Order Granting Reconsideration.

<sup>5</sup> Filed May 12, 2017.

<sup>6</sup> Filed May 19, 2017.

Thereafter, the Board propounded three questions to the County<sup>7</sup> to which it responded on June 26, 2017<sup>8</sup>. WEAN then filed a motion to strike the bulk of the County's response.<sup>9</sup> Rather than rule on WEAN's motion to strike, the Board granted WEAN two weeks to respond to the County's June 26, 2017 filing.<sup>10</sup> WEAN filed its response on July 11, 2017.<sup>11</sup>

## I. ANALYSIS AND DISCUSSION

A motion for reconsideration of a final decision of the Board is governed by WAC 242-03-830. WAC 242-03-830(2) provides that a motion for reconsideration shall be based on at least one of the following grounds:

- (a) Errors of procedure or misinterpretation of fact or law, material to the party seeking reconsideration; or
- (b) Irregularity in the hearing before the board by which such party was prevented from having a fair hearing.

The matters now before the Board are WEAN's substantive claims in support of its motion for reconsideration. Those claims are that the Board misinterpreted the facts and/or the law regarding:

- The Board's understanding or interpretation of the Best Available Science (BAS) as it relates to Western toad non-breeding habitat, including its range or dispersal distance;<sup>12</sup>
- The Board's conclusions regarding regular updating of Western toad "occurrences" for purposes of their protection.<sup>13</sup>

In reconsidering the Order Finding Compliance, the presumption of validity still applies and the burden remains on WEAN to establish that the County's action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act (GMA). In order to find the County's action

<sup>7</sup> Letter of June 12, 2017.

<sup>8</sup> Island County's Response Re: GMHB 6-12-17 Questions.

<sup>9</sup> WEAN's Motion to Strike and Exclude Re: Island County's Response to Three Questions (June 27, 2017).

<sup>10</sup> Letter of June 27, 2017.

<sup>11</sup> WEAN's Response of July 11, 2017.

<sup>12</sup> WEAN's Motion for Reconsideration at 6.

<sup>13</sup> *Id.* at 5.

1 clearly erroneous, the Board must be “left with the firm and definite conviction that a mistake  
2 has been made.”<sup>14</sup> The Board’s Order Finding Compliance addressed a single issue:  
3 whether the County had achieved compliance in regards to the designation and protection  
4 of the Western toad. In determining the County had achieved compliance, the Board found  
5 WEAN had failed to meet its burden of proof to establish violations of RCW 36.70A.060 or  
6 RCW 36.70A.172. That is, whether the County’s regulations adequately protect the  
7 Western toad and whether those regulations reflect inclusion of BAS. On reconsideration it  
8 is incumbent upon WEAN to establish that the Board’s challenged Order Finding  
9 Compliance findings and conclusions were based on a misinterpretation of fact or law.  
10 Finally, reconsideration does not provide WEAN an opportunity to broaden the scope of its  
11 challenge beyond that addressed by the Board in its Order Finding Compliance.  
12

#### 13 **A. BAS and Toad Habitat**

14 WEAN argues that the Board erred<sup>15</sup> in finding the County’s regulations compliant  
15 when those regulations do not protect the upland habitat of the Western toad; it describes  
16 that habitat as “essential”.<sup>16</sup> WEAN correctly contends that the BAS establishes that the  
17 toad spends much of its life cycle away from its breeding sites and WEAN takes exception  
18 to the Board’s conclusion that “The BAS in the record does not support the designation of  
19 other habitat areas.”<sup>17</sup>  
20

21 The Board notes that the BAS in the record supports the designation of “priority  
22 areas” in the context of the “Priority Habitats and Species (PHS) list” maintained by the  
23 Washington Department of Fish and Wildlife (WDFW). For the Western toad, the priority  
24 area is any “occurrence”,<sup>18</sup> as documented in PHS maps. As the Board stated in the April  
25 10, 2017 Order Finding Compliance:  
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29 <sup>14</sup> *Department of Ecology v. PUD No. 1*, 121 Wn.2d 179, 201(1993).

30 <sup>15</sup> WEAN’s Motion for Reconsideration at 6: “The Board has here committed a misinterpretation of law in not  
31 upholding GMA’s protection standard whether or not essential upland Western Toad habitat is currently known  
32 to be ‘limiting’.”

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Exhibit 80, The Watershed Company Technical Memorandum (November 22, 2016) at 1.

1 The Board's finding of continuing non-compliance was based primarily on the  
2 fact that the County's prior attempt to designate and protect Western toad  
3 habitat failed as a result of poorly crafted regulations. Additionally, the Board  
4 observed that the BAS in the record established that any "occurrence" of the  
toad was a "priority area" and that:

5 PHS in turn references the NatureServ Species Report which  
6 then states under Minimum Criteria for an Occurrence:

7 "Occurrences are based on evidence of historical presence, or  
8 current and likely recurring presence, at a given location." The  
9 State Department of Fish & Wildlife (WDFW) has documented  
10 three "occurrences" of the Western toad in Island County, "one  
11 of which is a breeding site." The other two WDFW-documented  
12 sites are terrestrial nonbreeding habitat. The record before the  
13 Board thus indicates there are possibly three locations  
14 evidencing current or likely recurring presence. WDFW PHS  
15 information is considered to be Best Available Science.

16 On compliance, the County designated all known "occurrences" of the Western toad.  
17 The BAS in the record does not support further designation of areas beyond those known  
18 occurrences, together with protections for areas within 1,000 feet of the six current Western  
19 toad occurrences and future Western toad breeding sites. While WEAN may describe  
20 upland habitat beyond 1,000 feet from a breeding site as "essential"<sup>19</sup> and argues that the  
21 County failed to provide a "reasoned justification" from BAS deviation, the BAS does not  
22 support WEAN's contention. The Board has not been provided with BAS evidence  
23 supporting WEAN's argument that additional upland habitat must be designated in order "to  
24 protect the functions and values" of the Western toad.<sup>20</sup>

25 As stated, the record discloses that "occurrences" are "priority areas". The County  
26 has designated all known "occurrences" based on the latest WDFW information.<sup>21</sup>  
27 However, it is also clear from the BAS that the designation of an "occurrence" does not  
28 necessarily indicate that the designated area has a "primary association" with an area that  
29 "provides a critical role in sustaining the toad". "Primary association" is a term used in the

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31 <sup>19</sup> A word WEAN uses four times in its motion for reconsideration.

32 <sup>20</sup> RCW 36.70A.172(1).

<sup>21</sup> Tab 20 attached to Island County's Compliance Report (February 10, 2017). A transcript of the Island  
County Board of Commissioners' Work Session of January 24, 2017, Index No. 127, County Index of Record  
No. 12576-12577.

1 Minimum Guidelines<sup>22</sup> applicable to Fish and Wildlife Habitat Conservation Areas  
2 (FWHCAs), and references the requirement to designate areas as FWHCAs where  
3 endangered, threatened, and sensitive [ETS] species have a primary association.<sup>23</sup> While  
4 the Western toad was previously listed as a federal species of concern, it is no longer,  
5 although it remains as a state candidate for listing as an ETS species.<sup>24</sup> As the BAS states,  
6 the designation of Western toad breeding site occurrences "is consistent with the Growth  
7 Management Act approach to designating habitat conservation areas for threatened and  
8 endangered species (WAC 365-190-130(2)(a)), and therefore, should be sufficient to  
9 address candidate species".<sup>25</sup> On compliance the County has designated as FWHCAs not  
10 only those breeding sites with which the toad has a primary association but also three  
11 additional known occurrences. Although Western toads do disperse from breeding sites,  
12 they can be expected to return in subsequent years to breeding sites.<sup>26</sup> Wetland breeding  
13 sites are critical to completion of the life cycle of the toad.<sup>27</sup>

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16 As the Board stated in its prior order, "The BAS in the record does not support the  
17 designation of other habitat areas."<sup>28</sup> WEAN's characterization of other upland habitat as  
18 "essential" is merely an allegation; it is an allegation not supported by the BAS included in  
19 the record before the Board. The County has designated those known "occurrences" and  
20 adopted protective regulations. While WEAN presents information which it argues supports  
21 designation of other areas, the County's assembled BAS (which the record clearly discloses  
22 the County considered), concludes additional areas beyond currently known "occurrences"  
23 are not warranted for designation. The Court of Appeals has addressed this question of  
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26 <sup>22</sup> Chapter 365-190 WAC.

27 <sup>23</sup> WAC 365-190-130(2)(a): Fish and wildlife habitat conservation areas that must be considered for  
28 classification and designation include:

29 (a) Areas where endangered, threatened, and sensitive species have a primary association.

30 <sup>24</sup> Ex. 39, The Watershed Company Technical Memorandum (May 5, 2016) at 1-2. It has been listed as a  
31 state candidate species for approximately 8 years.

32 <sup>25</sup> Ex. 93, The Watershed Company Technical Memorandum (January 5, 2017) at 1-2.

<sup>26</sup> Exhibit 80, The Watershed Company Technical Memorandum (November 22, 2016) at 2. "Western toads  
are known to exhibit some level of breeding site fidelity, meaning that they return to the same wetland site in  
subsequent years."

<sup>27</sup> Exhibit 80, The Watershed Company Technical Memorandum (November 22, 2016) at 2.

<sup>28</sup> Order Finding Compliance and Closing Case (April 10, 2017) at 12.

1 disputed science in regards to RCW 36.70A.172's requirement that BAS be included in  
2 designating and protecting critical areas:

3 A comparison with federal authority interpreting a similar "best available  
4 science" requirement in the Endangered Species Act (ESA) is instructive."  
5 [W]here . . . the agency presents scientifically respectable conclusions which  
6 appellants are able to dispute with rival evidence of presumably equal dignity,  
7 we will not displace the administrative choice. Nor will we remand the matter  
8 to the agency in order that the discrepant conclusions be reconciled." *State of*  
9 *Louisiana v. Verity*, 853 F.2d 322, 329 (5th Cir. 1988) (Footnote omitted). The  
10 purpose of the ESA's best available science requirement is to ensure that  
11 regulations not be based on speculation and surmise. (Citations omitted). We  
12 apply this view to RCW 36.70A.172(1).

13 The Board properly applied *State of Louisiana v. Verity* to the record before it  
14 in this case. The Board found the City took scientific evidence and included it  
15 in the record. HEAL presented evidence contrary to the evidence relied upon  
16 by the City. The Board properly concluded it could not displace the City's  
17 judgment about which science the City would rely upon as the best available  
18 science.<sup>29</sup>

19 In this matter, the County assembled BAS and it considered it in crafting its  
20 regulations. In this instance it is not within the Board's purview to "displace the [County's]  
21 judgment". WEAN has failed to show that the Board's decision was based on a  
22 misinterpretation of fact or law as it relates to the designation of additional Western toad  
23 upland, non-breeding, habitat. The County's actions are presumed to be valid and it is  
24 incumbent upon WEAN to establish that such action was "clearly erroneous in view of the  
25 entire record". It has not done so.

## 26 **B. Updating of Occurrences**

27 WEAN's position is that the County's regulations are crafted in a manner that  
28 provides one process for the future designation of Western toad breeding site occurrences  
29 and another for non-breeding site occurrences.<sup>30</sup> The Board concurs with that observation.  
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<sup>29</sup> *HEAL v. Growth Management Hearings Bd.*, 96 Wn. App. 522, 530-531 (1999).

<sup>30</sup> WEAN's Motion for Reconsideration at 4.

1 The Board also agrees with WEAN that its Compliance Order was less than clear in regards  
2 to updating of its Western toad designations as FWHCAs.<sup>31</sup>

3 RCW 36.70A.130 requires “continuing review and evaluation” of a jurisdiction’s  
4 development regulations, including its development regulations designed to designate and  
5 protect critical areas.<sup>32</sup> That review is required to be conducted every eight years.<sup>33</sup> All  
6 critical area regulation reviews must include BAS.<sup>34</sup> Science is not static, it evolves. The  
7 science available in 2016/2017 in regards to the Western toad may not be the same in 2024  
8 when Island County next reviews its critical area regulations. If BAS at that time indicates a  
9 need to designate and/or regulate activity in additional areas for protection of the toad, the  
10 County will need to include consideration of that BAS.

11 Jurisdictions are required to include consideration of the best available science, not  
12 the science that may become available next week or three years from now. Here the  
13 County has anticipated possible future scientific advances in regards to Western toad  
14 breeding habitat occurrences by including automatic designation of such areas as FWHCAs:

15  
16 ICC 17.02B.210 Western Toad breeding sites, as documented by  
17 scientifically verifiable data from WDFW, or a qualified professional, shall be  
18 protected through the county's wetland and stream critical areas regulations,  
19 presently codified in title 17. Such breeding sites, as they are presently known  
20 and documented as provided above, or may later be identified through the  
21 processing of site-specific land use and development permits or other  
22 scientifically verifiable data, are designated as Fish and Wildlife Habitat  
23 Conservation Areas. Also designated as Fish and Wildlife Habitat  
24 Conservation Areas are the occurrences identified on The Watershed  
25 Company Map, April 2016. (Emphasis added)

26 The designation of Western toad non-breeding site occurrences are addressed in the  
27 final sentence of ICC 17.02B.210. WEAN argues that fails to reflect consideration of BAS  
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30 <sup>31</sup> The Order Finding Compliance and Closing Case, (April 10, 2017), in referring to the designation of  
31 additional occurrences stated: “Additional occurrences may be added when verified ‘by scientifically verifiable  
32 data from WDFW, or a qualified professional’. Thus, it appears clear that additional occurrence sites can be  
added when verified”. That statement appears to refer to any occurrence, both breeding and non-breeding.

<sup>32</sup> RCW 36.70A.130(1)(a) and (c).

<sup>33</sup> RCW 36.70A.130(5).

<sup>34</sup> RCW 36.70A.172(1).

1 as it creates different designation criteria for the two types of occurrences.<sup>35</sup> The Board  
2 does not agree. As stated above, the County was required to consider BAS and the BAS  
3 identified and designated six (6) occurrences, including breeding and non-breeding  
4 occurrence sites. The County then took the extra step to automatically designate  
5 subsequently identified breeding sites. Non-breeding occurrences will be subject to BAS  
6 when the County conducts its next RCW 36.70A.130 review and update of its critical area  
7 regulations.  
8

9 As previously addressed, the BAS suggests that any “occurrence” is a “priority area.”  
10 The GMA requires counties to both **designate** and **protect** critical areas.<sup>36</sup> As to  
11 **designation** of FWHCAs, the GMA does not differentiate between breeding and non-  
12 breeding sites. BAS in the record supports the **designation** of “priority areas” with any  
13 reliably documented “occurrence” of Western toad, whether breeding or non-breeding.<sup>37</sup>  
14 Science in the record also shows the importance of upland, non-breeding dispersal areas  
15 for the Western toad:  
16

17 A biological site assessment (BSA) . . . would determine appropriate  
18 management measures to conserve the species within 1,000 feet of verifiable  
19 breeding sites. This BSA would include a description of potential corridors,  
20 analysis of potential impacts, and proposed best management practices to  
21 protect Fish and Wildlife Habitat Conservation Areas.<sup>38</sup>  
22 Western toads can occupy a variety of upland habitats, but rely on open water  
23 for breeding and egg development. . . . Following metamorphosis, thousands  
24 of toadlets disperse from the aquatic habitat into the adjacent upland terrestrial  
25 habitat. They generally remain close to aquatic areas during the day, but may  
26 range more widely at night. . . . For shelter, juveniles and adults dig their own  
27 burrows in loose soil, use the burrows of small mammals, or shelter under logs  
28 or rocks.<sup>39</sup>  
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30 Consistent with BAS, the County has designated all known occurrences of the Western  
31 toad.  
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<sup>35</sup> WEAN's Motion for Reconsideration at 5.

<sup>36</sup> RCW 36.70A.170, RCW 36.70A.060(2).

<sup>37</sup> Exhibit 80, The Watershed Company Technical Memorandum (November 22, 2016) at 2.

<sup>38</sup> Exhibit 93, The Watershed Company Technical Memorandum (January 5, 2017) at 2.

<sup>39</sup> Exhibit 39, The Watershed Company Technical Memorandum (May 5, 2016) at 3.



1 As to protection of designated FWHCAs, different management approaches may be  
2 appropriate for different FWHCAs. The BAS in the record includes the following  
3 observations:

4 To this end, even where priority areas are listed as any occurrence, different  
5 management priorities may be appropriate for different priority areas based  
6 on site-specific considerations and species habitat needs. In the case of the  
7 Western toad, a review of best available science ... indicates that wetland  
8 breeding habitats are critical to completion of the life cycle of the Western  
9 toad. In contrast, the upland habitat characteristics associated with Western  
10 toad are not well understood. Given this current limited understanding of  
11 upland habitat usage, the mapped upland occurrence of Western toad in  
12 Island County may not lend itself directly to site-specific management  
13 measures. The one documented upland occurrence<sup>40</sup> has the potential to  
14 help identify nearby wetland breeding areas and migratory paths, where  
15 additional management measures could be evaluated.<sup>41</sup> (emphasis added)

16 ... breeding sites ... represent areas with which the species is known to  
17 have a primary association. This approach to protecting habitats with which  
18 the species has a primary association is consistent with the Growth  
19 Management Act approach to designating habitat conservation areas for  
20 threatened and endangered species (WAC 365-190-130(2)(a)), and therefore,  
21 should be sufficient to address candidate species.<sup>42</sup>

22 Given the variety of upland habitats used by Western toad and the  
23 predominantly rural nature of unincorporated Island County, upland habitat for  
24 Western toad is not known to be limiting in the County.<sup>43</sup>

25 A documented occurrence provides an indication of the vicinity in which an  
26 individual Western toad may occur, but it does not provide assurance that the  
27 species will occur in the same area in the future. Western toads are known to  
28 exhibit some level of breeding site fidelity, meaning that they return to the  
29 same wetland site in subsequent years. Therefore, a documented breeding  
30 area could be expected to support Western toads in years subsequent to the  
31 observation.<sup>44</sup>

32 <sup>40</sup> Additional upland occurrences were identified by the County and designated as FWHCAs subsequent to the  
issuance of Exhibit 80.

<sup>41</sup> Exhibit 80, The Watershed Company Technical Memorandum (November 22, 2016) at 2.

<sup>42</sup> Exhibit 93, The Watershed Company Technical Memorandum (January 5, 2017) at 2.

<sup>43</sup> Exhibit 95, The Watershed Company Technical Memorandum (January 10, 2017) at 2.

<sup>44</sup> Exhibit 80, The Watershed Company Technical Memorandum (November 22, 2016) at 2.

1 Consistent with BAS, Island County requires a biological site assessment (BSA) as a  
2 result of a development application within 1,000 feet of a designated FWHCA to determine  
3 appropriate management measures to conserve the species. Here too, the record discloses  
4 that the County reviewed BAS and considered it.

5 In conclusion, although the GMA and BAS do not distinguish between breeding and  
6 non-breeding sites for purposes of complying with the current GMA requirement to update  
7 FWHCA designations, Petitioners failed to satisfy their burden of proof to demonstrate that  
8 future FWHCA designations cannot be done in the manner that the County has chosen in  
9 adopting Ordinance C-02-17. WEAN has failed to show that the Board's decision was  
10 based on a misinterpretation of fact or law as it relates to the updating of Western toad  
11 occurrences as designated FWHCAs. The County's actions are presumed to be valid and it  
12 is incumbent upon WEAN to establish that such action was "clearly erroneous in view of the  
13 entire record". It has not done so. While the Board's wording may have been inaccurate in  
14 its Compliance Order reference to the future designation of occurrences<sup>45</sup>, WEAN has not  
15 satisfied its burden of proof to demonstrate that the County's approach to updating  
16 designation of Western toad occurrences failed to include BAS.  
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## 19 II. ORDER

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21 Having reviewed WEAN's Motion for Reconsideration, WEAN's 2<sup>nd</sup> Objections to  
22 Finding Compliance Re: Western Toad, including the planning commission and Board of  
23 County Commissioner transcripts cited therein, the County's Response to the  
24 reconsideration motion, and the parties' responses to the Board's questions, the Board finds  
25 WEAN has failed to provide a basis, other than as set forth in the Board's May 1, 2017  
26 order, that compels reconsideration of the Order Finding Compliance and Closing Case.  
27 WEAN has not established that the Board misinterpreted the facts or the law. That is, errors  
28 of fact or law material to the outcome have not been shown. Therefore, for the reasons set  
29 forth above, WEAN's Motion for Reconsideration in regards to its substantive arguments is  
30 DENIED and the Board reaffirms its finding that Island County is in compliance with the  
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<sup>45</sup> Order Finding Compliance and Closing Case (April 10, 2017) at 10, lines 11-15.

1 Growth Management Act as to the designation and protection of Fish and Wildlife Habitat  
2 Conservation Areas for the Western toad.

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4 Entered this 21st day of July, 2017.

5 \_\_\_\_\_  
6 William Roehl, Board Member

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9 Nina Carter, Board Member

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11 Raymond L. Paoella, Board Member

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13 **Note: This is a final decision and order of the Growth Management Hearings Board**  
14 **issued pursuant to RCW 36.70A.300.<sup>46</sup>**

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31 <sup>46</sup> A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty  
32 days as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall  
be served on the board but it is not necessary to name the board as a party. See RCW 36.70A.300(5) and  
WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the  
Growth Management Hearings Board is not authorized to provide legal advice.